APPENDIX A.

In the Supreme Court of the State of California, in Bank.

John Oosten, Plaintiff and Respondent, v. Hay Haulers Dairy Employees, & Helpers Union, etc., *et al.*, Defendants, Knudsen Creamery Co. of California, Defendant and Appellant. L. A. 23085.

Filed Dec. 23, 1955.

Plaintiff, a dairy farmer, producer and seller of milk, recovered damages in the sum of $20,314.19 against defendant, Knudsen Creamery Co. (hereafter referred to as defendant), engaged in the business of processing and selling milk, for breach of contract, in an action against defendant and several unions and their officers. Judgment was for the unions denying plaintiff damages or an injunction against them. Defendant appeals; plaintiff has not appealed.

Plaintiff entered into a contract to supply milk to defendant Knudsen Creamery Co., and this contract was in effect between August 6, 1951 and March 15, 1952. Under this contract defendant agreed to purchase milk produced by plaintiff during this period. Clause 12 of the contract provided: "In case of strike, lockout, or other labor trouble (whether the parties hereto are directly or indirectly involved) . . . which shall render it *impossible* for Seller to deliver, or Buyer to handle or dispose of such milk, no liability for non-compliance with this agreement caused thereby during the time of continuance thereof shall exist or arise with respect to either party hereto." (Emphasis added.)

According to the findings of the trial court, between August 6, 1951, and March 15, 1952, defendants Hay Haulers, Dairy Employees and Helpers Union, Local Union No. 737, associated with A. F. of L., and Plant and Clerical Dairy Employees, Local 93, were labor unions, and that Dairy Employees Union Local 17, associated with the Christian Labor Association, not a party, was also a union; that some time prior to August 6, 1951, defendant unions were having a labor dispute with plaintiff and declared a boycott against and picketed plaintiff's place of business; that the picketing activity was stopped by a restraining order issued by the court; that defendant breached the contract in refusing to take plaintiff's milk from August 6, 1951, to March 15, 1952, when plaintiff sold his dairy herd; and that as a result, plaintiff suffered the damage above mentioned. Defendant's only reason for refusing to accept the milk was a claimed impossibility of performance under clause 12 of the contract, *supra*. The court found that defendant did not "prove by a preponderance of the evidence that it was impossible for it to handle or dispose" of plaintiff's milk within the meaning and "proper interpretation" of clause 12.

Defendant contends that the evidence all shows that it was excused from accepting the milk under clause 12 because of the refusal of its employees to handle it due to the labor dispute between plaintiff and local 737; that plaintiff's failure to dispose of his milk at the prevailing market prices was caused by his dispute with the unions rather than a breach by defendant of the contract.

The evidence shows that in July, 1951, plaintiff had nine employees. He was then asked by the defendant unions to sign a collective bargaining agreement by which they would represent his employees. He refused to sign,

asserting that his employees did not want to join the unions. He was advised by the unions that unless he signed, his place of business would be picketed. On July 27, 1951, he signed a collective bargaining agreement with Local 17 and in that connection the court found he took a leading part in inducing his employees to join that union. Picketing of plaintiff's place of business by defendant unions was commenced on August 6, 1951. A defendant union representative told defendant's employees, but not defendant, that a dispute existed with plaintiff and they did not have to handle plaintiff's milk. Plaintiff hauled his milk to defendant's receiving point. Nygaard, defendant's foreman of unloading operations, refused to take the milk and called two of defendant's supervisory employees, and the foreman's request of the unloading employee, Lorge, that he unload the milk was refused on the grounds that it was "unfair" milk, because of the dispute between plaintiff and defendant unions.* Plaintiff disposed of his milk elsewhere. Plaintiff commenced the instant action, and having obtained a restraining order against defendant unions, the picketing stopped. Several other attempts were made by plaintiff to deliver milk to defendant including the following: In September, 1951, he attempted to deliver his milk to defendant the same as before. Defendant's supervisory employees were present and the employee in charge of the unloading operation was given a copy of the restraining order but said he would not handle the milk and defendant's foreman said they could do nothing about it. About two weeks later a similar attempt under similar circumstances was

*The unloading was done by defendant's employee pumping it from plaintiffs' truck and could be done by one man.

made with similar results, with the addition that a new restraining order had been obtained which ordered defendant's employees to handle plaintiff's milk. Plaintiff testified that none of defendant's supervisory employees who were present, except foreman Nygaard, ordered Lorge or anyone else to unload the milk when plaintiff attempted to make the various deliveries; however, there is evidence that one of such supervisory employees gave such order. After Lorge had refused to unload the milk, defendant's supervisory employees said there was nothing they could do about it. On August 28, 1951, plaintiff wrote to defendant regarding its refusal to accept the milk, stating that he had obtained an injunction against the picketing and demanded that defendant comply with the contract.

There is evidence that Local 93 with whom defendant had a collective bargaining agreement covering its employees advised defendant that plaintiff's milk was "hot" and the employees under the bargaining agreement did not have to handle it and could not be fired for refusing to do so; that the restraining order obtained by plaintiff did not change the situation; that an exempt employee of defendant, a supervisory employee, could not unload the milk. In a similar case a year before, Local 93 had informed defendant that if any of its employees were fired or discharged for refusing to handle "hot" milk, the plant would be shut down. Defendant called a large number of its employees as witnesses, and they testified that they would have refused and would still refuse to handle plaintiff's milk under the circumstances, and it was stipulated that the rest of its employees would testify to the same effect.

Impossibility of performance is a defense and the burden of proof in establishing it rests on defendant.

(Hensler v. City of Los Angeles, 124 Cal. App. 2d 71, 83; Paramount Pictures, Inc. v. Sparling, 93 Cal. App. 2d 768; McCulloch v. Liguori, 88 Cal. App. 2d 366; Lloyd v. Murphy, 25 Cal. 2d 48.) " 'Impossibility' is defined in section 454 of the Restatement of Contracts, as not only strict impossibility but as impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved. Temporary impossibility of the character which, if it should become permanent, would discharge a promisor's entire contractual duty, operates as a permanent discharge if performance after the impossibility ceases would impose a substantially greater burden upon the promisor; otherwise the duty is suspended while the impossibility exists. (Restatement of Contracts, §642.)" (Autry v. Republic Productions, Inc., 30 Cal. 2d 144, 148; Lloyd v. Murphy, *supra,* 25 Cal. 2d 48.) In the instant case we construe clause 12, with respect to impossibility of performance, the same as it is construed generally in contract law with regard to whether the performance has been made impossible. The only things the clause adds are that certain things—labor dispute, strikes—may excuse performance, when without it they might not, but the question remains whether those things have made performance impossible. As has been said: "We can not always be sure what 'causes are beyond the control' of the contractor. Many fires can be prevented by the use of foresight and sufficient expenditure. Most strikes can be avoided by a judicious yielding or by an abject surrender to demands. No contractor is excused under such an express provision unless he shows affirmatively that his failure to perform was proximately caused by a contingency within its terms; that, in spite of skill, diligence and good faith on his part, performance

became impossible or unreasonably expensive." (Corbin on Contracts, §1342.)

On the record before us the trial court was justified in concluding, as it did, that defendant was not prevented by impossibility from performing the contract. There was no evidence that the union would call a strike if the milk was received by defendant, except the inference that might be drawn from its claim in a similar situation a year before that it would shut down defendant's plant if defendant handled hot milk. The trial court was not compelled to draw that inference. The court could have given little weight to the effect on defendant's employees of the statement by the officials and attorney of Local 93 that they, as individuals, were not required to handle hot milk or that the telling of defendant that they would not consider it a breach of the collective bargaining agreement between defendant and Local 93 for the employees to refuse to handle the milk. Defendant at no time told its employees that if they refused to handle plaintiff's milk they would be discharged. In the bargaining agreement between defendant and Local 93 the latter agreed that there shall be no strike during the life of the agreement and if any controversy arose it would be settled by the negotiation procedure in the agreement, and ultimately by arbitration, if the other means failed. The court could inf that Local 93 would abide by the agreement. No steps were taken to settle any controversy under the agreement. The weight of the testimony of defendant's employees that they would not have handled plaintiff's milk was for the trial court. Many of them knew little about the dispute as to plaintiff's milk or what defendant had been doing about hot milk or the attitude of Local 93. At most their testimony was as to what they *would do,*

a matter only of their mental attitude, and whether they would actually refuse when confronted with the possibility of discipline was another matter. The trial court was justified in its finding that defendant had not proven impossibility; indeed, it may have concluded that defendant showed nothing more than a vague threat of adverse action by Local 93 and the employees (see, Moore v. Whitty (Pa.), 149 A. 93, 94), and that defendant was under no pressure other than its desire not to antagonize Local 93.

Plaintiff's counsel remarked in his opening statement that defendant's plant would "probably be tied up" if it took plaintiff's milk but we do not consider that as conclusive. The trial court could still determine the case on the evidence. There is evidence that defendant's employees would obey the officials of Local 93, but as we have seen, it does not appear that Local 93 would necessarily have called a strike. The collective bargaining agreement between defendant and Local 93 provided that defendant could not "discriminate against" its employee members of Local 93 for "upholding the *principles* of the American Federation of Labor" (emphasis added) but there still was the arbitration provision and the court was not required to find that those *"principles"* included a boycott. Nor is the situation different because the court approved the action of defendant's employees in refusing to handle the milk by denying an injunction or the loss that might have been suffered by defendant if its plant was shut down because, as seen, defendant did not establish to the satisfaction of the trial court that such loss was imminent.

Contrary to defendant's contention we do not find any prejudging by the trial court of defendant's many em-

ployees who testified that they would not have handled the milk. He merely remarked that it would take an employee of courage to testify otherwise in the presence of agents of Local 93 and that "as far as the weight of the evidence goes I think it is not as strong as it might be."

It is not decisive whether a strike or a refusal of Local 93 to instruct its members to handle the milk or a refusal by defendant's employees to unload the milk would be legal or illegal action for, as seen, the matter here turns on whether defendant has sustained its burden of showing impossibility, the existence of which would excuse it from performance where caused by a strike or labor trouble.

Complaint is made that the damages were caused, not by defendant's refusal to take the milk but rather by the fact that the milk was "hot" because of plaintiff's dispute with Local 737 which prevented him from selling it elsewhere at the current market price; that plaintiff brought on the labor dispute with Local 737 by signing with Local 17 and discharging an A. F. of L. employee working for him; that the evidence shows there was a market price established under stated law for Class 1 milk, the kind plaintiff produced, and the contract between them provided for such market price.

If that argument means that the cause of the contract breach by defendant was the labor dispute in which plaintiff was involved it is nothing more than another argument on the issue of impossibility heretofore discussed. Defendant breached the contract, but plaintiff, in spite of the labor dispute with Local 737, delivered the milk and endeavored to have defendant accept it. Thus the damages, whatever they may be, were caused by defendant's refusal

to accept the milk rather than plaintiff's labor dispute. Defendant's breach not being excused, as found by the trial court, it follows that plaintiff is entitled to any damages he suffered by reason of defendant's refusal to buy the milk. The question then arises as to the proper measure of damages. Is the difference between the current market price of Class 1 milk and the price fixed in the contract the proper measure here? Section 1784 provides: "(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

"(2) . . . The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an *available market* for the goods in question, the measure of damages is, in the absence of special circumstances, showing *proximate* damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

"(4) (*Mitigation.*) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or

the sale had been fully performed shall be considered in estimating such damages." (Emphasis added; Civ. Code, §1784.) Because plaintiff had his herd of cows and they inevitably produced milk daily, the milk was certain to be produced and he should not be required to get rid of his herd to stop production; therefore, subdivision 4 of section 1784 can have no application. (See, O'Hare v. Peacock Dairies, Inc., 26 Cal. App. 2d 345.)

Defendant urges that subdivision 3 is applicable and as there were not special circumstances showing *proximate* damage of a greater amount, the difference between the contract price and the market price is the measure; that the contract price and current market price were the same and plaintiff's labor dispute, which made the milk hot rather than defendant's refusal to accept it, was the proximate cause of any additional damages suffered by him; that hence plaintiff was entitled to no more than nominal damages. The court found that "the only creamery company within practicable delivery distance of plaintiff's dairy, which would accept plaintiff's milk during the period extending from August 6, 1951, to March 15, 1952, was the Excelsior Creamery Company . . . that said . . . Company, for the [said] period . . . did accept all of plaintiff's milk . . . but said Creamery Company was unable to use all of such milk as Class I milk by reason of pre-existing contracts with other milk producers, but, on the contrary could accept part of said plaintiff's milk only as Class II or as manufacturing milk, respectively; the Court further finds that the prices paid milk producers by creameries, in accordance with the rules and regulations of the Bureau of Milk Control of the State of California, for Class II milk and for

manufacturing milk, respectively, is considerably less in each case than that paid for Class I milk; the Court further finds that the difference between that which the plaintiff received for his milk, for the period extending from August 6, 1951, to March 15, 1952, from Excelsior Creamery Company and that which he would have received from the defendant . . . had said defendant carried out the terms of the above described contract . . . by accepting all of plaintiff's milk . . . as Class I milk, totals $20,314.19." The evidence shows plaintiff sold his milk to the Excelsior Creamery Company at Santa Ana, 20 miles from his dairy (defendant's plant is in Los Angeles, 20 miles from plaintiff's dairy) but Excelsior had no market for Class I milk and paid plaintiff at the rate for a lower class of milk. Plaintiff testified that he tried to sell it elsewhere but could not because it was considered hot milk due to his dispute with Local 737. A witness for defendant testified that during the period for which damages were awarded there was a market in the area for Class I milk. While it may be that one of the causes why plaintiff could not dispose of his milk, except to Excelsior was the labor dispute, it still is true that he did not have any market for it except to Excelsior. There was no defect in the quality of the milk and defendant had no legal excuse for its refusal to accept the milk. The refusal of defendant and other union milk buyers to take plaintiff's milk resulted, at least in part, because they thought it might have some effect upon their collective bargaining agreements with the union. Thus a proximate cause of defendant's refusal to take the milk was plaintiff's inability to find a market. Under all the circumstances the court was justified in concluding that the only market available was Excelsior,

the company to which plaintiff sold the milk, and the difference between the price they paid and that specified in the contract was a proper measure of damages.

Amici curiae have filed a brief urging some of the points heretofore discussed and further asserting that the activity of the union defendants was a boycott, illegal under the Labor Management Relations Act (29 U. S. C. A. 158), and thus easily prevented by defendant by the machinery provided in that act, and that an illegal act by another will not support a finding of impossibility of performance. There is nothing in the case to indicate that the national law is here applicable. Hence there is no occasion to discuss the merits of this contention.

The judgment is affirmed.

CARTER, *J.*

We concur:

GIBSON, *C. J.*

SHENK, *J.*

TRAYNOR, *J.*

APPENDIX B.

Oosten v. Hay Haulers Etc. Union, *et al.* L. A. 23085.

Dissenting Opinion of Edmonds, J. to Opinion of Carter, J.

Paragraph 12 of the contract which governs the rights of Oosten and the dairy provides: "In case of strike, lockout, or other labor trouble (whether the parties hereto are directly or indirectly involved) . . . which shall render it impossible for Seller to deliver, or Buyer to handle or dispose of such milk, no liability for non-compliance with this agreement caused thereby during the time of continuance thereof shall exist or arise with respect to either party thereto." In resisting the contention that Knudsen's performance was excused by this provision, the majority rely upon the finding that "the defendant . . . did not prove by a preponderance of the evidence that it was 'impossible' for them to 'handle or dispose of' the milk of the plaintiff. . . ."

Although the burden of proving the facts upon which the defense of impossibility of performance rests lies with the one claiming under the defense (Hensler v. City of Los Angeles, 124 Cal. App. 2d 71, 83; Paramount Pictures, Inc. v. Sparling, 93 Cal. App. 2d 768, 775), whether the facts show the excuse of impossibility is a conclusion of law to be drawn by the court. (Mitchell v. Ceazan Tires, Ltd., 25 Cal. 2d 45, 48.) In the present case, there is no substantial dispute in the evidence as to the circumstances and the conduct of the parties in relation to them.

California follows a more liberal view than the courts of many other jurisdictions in the application of the doctrine of impossibility. It is not enough that performance

of the contract is made more difficult or expensive (McCulloch v. Liguori, 88 Cal. App. 2d 366, 372-373 and cases cited), but performance may be excused under circumstances showing "not only strict impossibility but . . . impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." (Autry v. Republic Productions, Inc., 30 Cal. 2d 144, 148; City of Vernon v. City of Los Angeles, 45 A. C. 735; Mineral Park Land Co. v. Howard, 172 Cal. 289, 293; Restatement of Contracts, §462.)

It may be presumed that in adopting paragraph 12 of their contract, the parties had in mind the more liberal rule as to "impossibility" established by California law. Furthermore, the parties appear to have so qualified their use of the term by express contemplation of the possibility of "strike, lockout, or other labor trouble (whether the parties hereto are directly or indirectly involved)," contingencies which ordinarily do not render performance impossible under strict definitions of the term. Such a provision, even under the strict view of impossibility followed by many courts, probably would suffice as a "proper condition" or "qualification" whereby a party might "shield" himself from impracticability of performance arising from labor difficulties. (*Cf.* Kiyoichi Fujikawa v. Sunrise Soda Water Works, 158 Fed. 2d 490, 493.)

Oosten was directly involved in a labor controversy with the union which also represented the workers of Knudsen. Because of that controversy his milk was branded as being "unfair." Unquestionably, the refusal of Knudsen's workers to handle the milk, was based upon the demands of the union representatives. The testimony of the Knudsen men who received and processed the milk

establish that they refused to handle it even in face of threats of discharge. In these circumstances, performance of the contract would have been impractical and unreasonably difficult.

The argument is made, however, that Knudsen should have taken further action in an effort to coerce its employees to handle Oosten's products. Knudsen might have discharged its employees who refused to handle the products and then attempted to pursue its legal remedies, if any, against the union, which, it is said, at most made only "a vague threat to call a strike" if the products were handled. (*Cf.* Moore v. Whitty [Pa.], 149 A. 93, 94.) But the evidence clearly shows that the employees vital to the processing of the milk refused to handle it despite a court order, the direct orders of the employer's representatives to handle the milk and the threat of discharge. To require the employer to discharge its employees, with resulting losses in the handling of the products of other suppliers, would place upon the employer the burden of sustaining additional losses without any likelihood that it could fulfill its obligations under the Oosten contract.

Furthermore, it is unrealistic under present day conditions to construe a clause designed to insulate the parties to a contract from liability for nonperformance arising from "labor trouble" as affording protection only to the party who ultimately establishes the justice of his position in the controversy. Commonly, particularly in matters involving economic pressure against persons not directly involved in the labor dispute, the parties are thrown into the controversy without any certainty of their ultimate legal rights. In such a case, there is even greater reason why such person should wish to shield himself from lia-

bility for nonperformance occasioned by a yielding to the pressure.

For these reasons, in my opinion, reasonably construed, paragraph 12 of the contract excuses performance of it under the circumstances established by the undisputed facts.

The judgment should be reversed.

EDMONDS, *J.*

We Concur:

SCHAUER, *J.*

SPENCE, *J.*

APPENDIX C.

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Entered Aug. 17, 1953, Book 2592, Page 352, by J. Howard, Deputy.

Filed Aug. 11, 1953, Harold J. Ostly, County Clerk, by D. D. Parker, Deputy.

In the Superior Court of the State of California in and for the County of Los Angeles.

John Oosten, Plaintiff, vs. Hay Haulers, Dairy Employees & Helpers Union, Etc., *et al.*, Defendants. No. 589,395.

JUDGMENT.

This cause came on regularly for trial before the Court sitting without a jury, Russell E. Parsons, Esq., and John Van Aalst, Esq., appearing as counsel for the plaintiff; Stevenson & Richman, by Lionel Richman, Esq., appearing as counsel for the defendants, Hay Haulers, Dairy Employees and Helpers Union Local No. 737, Plant and Clerical Dairy Employees Union Local 93, Thomas E. Case, Jake Menage, Al Moen and Mark Whiting; Vaughan, Brandlin & Wehrle, by Warran J. Lane, Esq., and J. R. Vaughan, Esq., appearing as counsel for the F.F.H. a California corporation, defendant, Knudsen Creamery Company of California, and the Court having heard the testimony and having

examined the proof offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance herewith; Now, Therefore, by reason of the law and Findings aforesaid:

It Is Hereby Ordered, Adjudged And Decreed:

1. That plaintiff have judgment against the defendant, F.F.H. of California, a California corporation, Knudsen Creamery Company in the sum of $20,314.19;

2. That plaintiff have judgment against defendant, F.F.H. of California, a California corporation, Knudsen Creamery Company for his costs of suit herein incurred;

3. That plaintiff take nothing against defendants, Hay Haulers, Dairy Employees and Helpers Union Local No. 737, Plant and Clerical Dairy Employees Union Local 93, Thomas E. Case, Jake Menage, Al Moen and Mark Whiting, and that said defendants have judgment for their costs of suit herein incurred against plaintiff;

4. That the preliminary injunctions heretofore issued are dissolved.

Dated this 11th day of August, 1953.

FREDERICK F. HOUSER,

Judge of the Superior Court.

APPENDIX D.

Opinion of the District Court of Appeal.

In the District Court of Appeal, Second Appellate District, State of California, Division One.

John Oosten, Plaintiff and Respondent, vs. Hay Haulers, Dairy Employees and Helpers Union, Local Union No. 737, A. F. of L., Plant and Clerical Dairy Employees Union, Local Union No. 93, A. F. of L.; Knudsen Creamery Company of California, a corporation, Thomas C. Case, Jack Menage, Al Moen and Mark Whiting, John Doe 1 to 10, inclusive of all intervening members as though each John Doe were severally and separately designated, Defendants.

Knudsen Creamery Co. of California, Appellant. 2nd Civil No. 20153.

Filed Jan. 17, 1955.

Appeal from a judgment of the Superior Court of Los Angeles County, Frederick F. Houser, Judge.

For Appellant: Vaughan, Brandlin & Wehrle, By: J. R. Vaughan and Warren J. Lane.

For Respondent: Russell E. Parsons and John Van Aalst.

Appellant Knudsen Creamery Co. is engaged in the business of manufacturing and distributing milk and milk products with its principal place of business in the city of Los Angeles. Approximately 500,000 pounds of fresh milk are received and processed daily at the Los Angeles plant. Prior to August 6, 1951, respondent John Oosten, a dairy farmer, was one of the principal suppliers of milk to appellant Creamery Co. at its Los Angeles plant, and had been such a supplier for approximately ten years.

Defendant Hay Haulers, Dairy Employees and Helpers Union, Local Union No. 737 of the International Brotherhood of Teamsters, Chauffeurs & Warehousemen, affiliated with the A. F. of L. (hereinafter called Local 737), is a labor union having as one of its objects the organization of milkers in Los Angeles County in the vicinity of respondent's dairy farm. Defendant Tom Case is the Secretary-Treasurer of Local 737.

The defendant Plant and Clerical Dairy Employees Union, Local No. 93 of the International Brotherhood of Teamsters, Chauffeurs & Warehousemen, affiliated with the A. F. of L. (hereinafter called Local 93), is a labor union comprising, with other affiliated locals, all of the employees of appellant and of all the other major creameries in Southern California. Defendant Mark Whiting is the Secretary of Local 93.

The Christian Labor Association, Local No. 17, is a labor union of dairy employees in the same territory as that in which Local 737 exists.

The business relations between respondent and appellant Creamery Co. were evidenced and governed through the years by written contracts, the current one being introduced into evidence at the trial of this litigation.

On July 13, 1951, representatives of Local Union 737 called upon respondent and informed him that some of his employees wanted to join the A. F. of L. and gave him a copy of a proposed labor agreement to read over. The following Monday, the representatives of Local 737 again visited respondent and he told them he had not had time to get legal advice. Two days later, on Wednesday, respondent told these representatives of Local 737 that he did not desire to sign a contract with them. Respondent testified that he next saw defendant Case on August

3, 1951, at which time Case again sought to have him sign a contract with his union and informed him that if he did not sign there would be a picket line the following week.

A few days after the first visit from the representatives of Local 737 respondent had a conversation with Ben Meninga, Business Agent of Local 17 of the Christian Labor Association and on July 27, 1951, respondent signed a contract with the latter union.

On August 6, 1951, Local Union 737 put a picket line in front of respondent's dairy farm. At 6:00 a.m. on that day, an hour before the picketing started, Jess Goins, Business Agent of Local 93, appeared at the Knudsen Creamery Co. plant at 1974 Santee Street. Pete A. Breum was the employee of Knudsen Creamery Co. on duty at the dock to receive milk tankers. Goins spoke to Breum; he told him that a load of respondent's milk was coming in that morning; he described the milk tanker of respondent and told Breum that the latter's milk was unfair and that Breum didn't have to handle it. Breum reported this information to all the other employees that he was working with but said nothing to any of the management of Knudsen Creamery Co. Respondent's truck arrived about 9:00 a.m. Breum informed the driver that he couldn't handle respondent John Oosten's milk because it was unfair, but would unload Ralph Oosten's milk which was in a trailer attached to the same truck. Mr. Goins was joined by Mr. Vanderhar, Business Agent for Local 737, and both were present at the scene when respondent's truckload of milk arrived.

Prior to this occasion respondent had been dealing with appellant for ten years and during that time appel-

lant had never refused to take respondent's milk. Respondent testified that he knew that all of the employees of appellant were members of A. F. of L. Unions and that Al Lorge and Eugene Krug were the designated milk receivers.

After the employees of appellant refused to handle respondent's milk he delivered the milk to the Excelsior Creamery, a non-union creamery at Santa Ana, in Orange County, and continued to sell his milk to Excelsior from then on. He did not try to sell his milk to any other creamery because he did not know of any other non-union creamery and he knew that no union man would take the milk. Respondent brought milk to appellant's plant on five occasions subsequent to August 6, 1951, *i.e.*, on August 16, August 29, September 1, September 8, and October 3.

Respondent had not accompanied his truck on August 6, 1951, but on August 16 he arrived at appellant's plant before his truck arrived and went to the office of Mr. Urquhart, appellant's Production Manager. His truck arrived about 12:30 p.m. There were then present on the receiving dock respondent, appellant's Production Manager, Plant Superintendent, Director of Industrial Relations, the Assistant Plant Superintendent, and Eugene Krug, the designated milk receiver. In the presence of all these persons, Mr. Nygaard, the Assistant Plant Superintendent, ordered Krug twice to receive the milk. Respondent testified that Nygaard said "We have a contract with John Oosten to receive the milk and I order you to receive this milk." The employee refused, saying that it was against the Union By-Laws to handle unfair milk.

On August 29, and September 1, 1951, the employee Al Lorge refused to handle the milk. When asked who

told him that the milk was "hot" he said he wasn't talking and finally walked away. On one or two occasions, Mr. Meninga, the Business Agent of Local 17, and Mr. Boer, of an organization known as United Dairymen, and a Mr. Miller were also present. On September 8, 1951, Miller told Lorge about a preliminary injunction and that he would be in contempt of court if he didn't take the milk, but Lorge nevertheless refused to handle the milk.

On October 3, 1951, Jesse M. Corneilson, a private detective employed by respondent's attorneys, served copies of a second preliminary injunction on several employees of appellant, including Al Lorge. When respondent's truck of milk arrived, Greenburg, appellants' Director of Industrial Relations, called those present into one group. In reply to questions of Greenburg, Lorge stated that he had received a copy of a court order, had read it and that he understood it. Greenburg then said: "We are under a court order to receive this milk . . . We want you to unload it." Lorge said he would not and Greenburg said: "We order you to unload it." Lorge replied: "I refuse to do it . . . It is unfair."

Lorge then left to call Local 93. When he returned, Corneilson asked him if he would receive the milk, and he said: "Absolutely not." Corneilson informed Lorge that he would be in contempt of court, but Lorge was steadfast in his refusal to receive the milk.

Immediately upon learning of the incident at the receiving dock on August 6, 1951, appellant's management commenced an inquiry. Breum was interrogated. About August 10, 1951, Mr. Greenburg conferred with defendant Mark Whiting, Secretary of Local 93, to which

appellant's production employees belonged. Whiting said that the injunction prohibiting further picketing by Local 737 did not change the status of the milk so far as Local 93 was concerned or in so far as appellant's employees were concerned. He said that the milk was still "hot." About September 1, 1951, Greenburg conferred with Baird and Goins, who were officials of Local 93. Baird said that the employees did not have to receive the milk because it was "unfair" and they did not have to handle an "unfair" product. He said that under the contract with the Union an exempt employee could not dump the milk and that appellant could not fire an employee for refusing to dump the milk. In connection with a similar case a year before the Oosten matter, Whiting had informed appellant that if the company disciplined or discharged an employee for refusing to handle "hot" milk, the plant would be shut down.

Following repeated attempts to deliver milk to appellant Creamery Co. and the refusal of the latter to accept it, respondent Oosten instituted an action against defendant Unions, certain of their officers and appellant Knudsen Creamery Co., for injunctive relief, damages and for breach of contract. Following trial before the court, judgment was rendered denying respondent relief as against the defendant Unions but judgment was ordered against appellant Creamery Co. in the sum of $20,314.19, representing the difference between what respondent would have received from appellant Creamery had the latter, pursuant to the terms of its contract, purchased and received from respondent Oosten all of the milk produced by the latter's herd, and what respondent actually received for the milk from Excelsior Creamery Co., to whom the product was sold after appellant Creamery Co.,

refused to take delivery thereof. From such judgment, Knudsen Creamery Co. prosecutes this appeal.

As a first ground for reversal of the judgment, appellant earnestly insists that the labor troubles above narrated rendered it impossible for appellant to handle or dispose of respondent's milk on and after August 6, 1951.

The milk purchase agreement between appellant and respondent, in effect on the last named date contained the following provision:

"12. In case of strike, lockout or other labor trouble (whether the parties hereto are directly or indirectly involved) . . . which shall render it impossible for Seller to deliver, or Buyer to handle or dispose of such milk, no liability for non-compliance with this agreement caused thereby during the time of continuance thereof shall exist or arise with respect to either party hereto."

We are not here concerned with a situation wherein the parties to a contract did not foresee the possibility of labor troubles preventing performance of their agreement. On the contrary, they recognized such a contingency and shielded themselves against it by the aforesaid condition and qualification contained in paragraph 12 of their contract.

The question, therefore, resolves itself as to whether, under the facts and circumstances here present, it was "impossible" for appellant Creamery Co. to handle and dispose of respondent's milk.

In section 454 of the Restatement of Contracts, "impossibility" is defined as not only strict impossibility but as impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. In mod-

ern cases, not only objective impossibility in the true sense is recognized as a defense, but also impracticability due to excessive and unreasonable difficulty or expense. (Autry v. Republic Productions, Inc., 30 Cal. 2d 144, 148, 149; Christin v. Superior Court, 9 Cal. 2d 526, 533; Transbay Coast Co. v. City and County of San Francisco, 35 Fed. Supp. 433, 435.)

As a general rule it is true as contended by respondent that when a party by his own contract creates a duty or a charge upon himself, he is bound to a possible performance of it because he promised it. But this general rule is grounded on the premise that the promisor did not shield himself by proper conditions or qualifications. In the instant case both parties to the contract were mindful of the difficulties that might ensue should either become involved in labor troubles. And so they wrote into their contract a dispensation from performance if labor troubles which either "directly or indirectly" involved either party rendered performance impossible. And, in shielding themselves against the consequence of labor troubles, the parties herein did not limit their dispensation from performance to an all out strike, lockout or a complete shut-down of their respective activities due to labor troubles, but specifically provided as follows: ". . . or other labor trouble (whether the parties hereto are directly or indirectly involved) . . ."

Under the definitions of impossibility as above set forth let us examine the factual situation confronting appellant Creamery Co. to determine whether it was impracticable because of extreme or unreasonable difficulty, expense, injury or loss, for it to handle or dispose of respondent's milk. Appellant had a labor contract with Local Union No. 93 and that Union instructed its mem-

bers employed by appellant not to handle respondent's milk because it had been labeled "unfair" or "hot" by Local Union No. 737, and the members of Local No. 93 were ordered by appellant to handle respondent's milk refused to do so and the remaining 210 union employees of appellant testified they would not have handled respondent's milk even if they were to be discharged for such refusal. What would have happened had appellant discharged such union employees was made perfectly clear at the trial. Appellant would have been faced with a strike of its own employees, its plant would have been shut down and it would have been effectively prevented from receiving or disposing of any milk whatsoever. To us it seems manifest that appellant was confronted with insurmountable difficulties. And furthermore, respondent's loss was proximately occasioned, not through any act of appellant, but by reason of his own controversy with Local Union No. 737. As pointed out by appellant, "Knudsen's unwillingness to precipitate a general work stoppage had good reason. A staggering loss would have been sustained, not only by Knudsen but also by all other producers shipping milk to Knudsen, if Knudsen's Teamster represented employees had refused to perform their jobs, thereby leaving this perishable commodity to spoil in Knudsen's plant. Factually, we know that it takes eight hours to get fluid milk from the tanker to the bottle in Knudsen's operation. . . . All milk coming into the plant is commingled. . . . Knudsen's Los Angeles plant handles about 500,000 pounds of milk a day. This milk comes in through the medium of fifteen to twenty tankers having an average capacity of 23,000 to 24,000 gallons of milk per tanker. Respondent argues that Knudsen should have brought on a strike and

infers thereupon its obligation would be excused. . . . The trial court makes the same point when it says that Knudsen should have 'tested' for a strike. . . . Neither respondent, nor the trier of fact were confronted with making the decision of whether to take the step which would place in jeopardy 500,000 pounds of milk. The producers of this milk would have lost if it were to perish because of John Oosten's labor trouble, because in the face of strike or work stoppage paragraph 12 of the contract would certainly exonerate Knudsen from liability. It is one thing to conjecture without responsibility; it is a different thing to conjecture with knowledge of terrible losses to innocent bystanders which will result from a wrong decision."

Viewed in the light of the rules heretofore announced, adopted as they were to make for justice between the parties to a contract, we are persuaded that under the provisions of the foregoing paragraph 12 of the contract now before us, appellant was excused from performance of its contract with respondent, and that under the circumstances here present, it would be unjust to require, as the judgment herein does, that appellant Creamery Co. underwrite the whole expense of respondent's controversy with the Unions, and with which controversy appellant Creamery Co. had no connection.

The foregoing conclusion at which we have arrived makes it unnecessary to consider or determine other issues presented on this appeal.

The judgment is reversed.

WHITE, *P. J.*

We concur:

DORAN, *J.*

DRAPEAU, *J.*

APPENDIX E.

The Trial Court's Refusal to Hear the Cause and His Bias and Prejudice Disclosed in the Record, Cause the Proceedings to Be Arbitrary and Unfair, and Lacking in Due Process of Law.

It is most difficult with decorum to express belief in the dereliction of a judge in his responsibilities. We have argued at every state of the proceeding the right of Knudsen to be heard fairly and at the time the matter was in trial, on the issue presented by the refusal of its employees to handle Oosten's milk. We have stated that we believe the record speaks for itself. Perhaps we have been too limited in our argument, but it seemed to us, as it still does, that the fundamental statutory and constitutional principles which are applicable are too basic to require great elaboration.

A. The Refusal of Hearing to Knudsen by the Trial Judge While the Dispute Was Pending Constituted a Denial of Due Process Guaranteed to Knudsen by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13 of the Constitution of the State of California.

The first attempted delivery of Oosten's milk took place on August 6, 1951. On August 5, 1951, before bringing his milk to Knudsen's plant, arrangements had been made with Excelsior Creamery Company, a non-union creamery, of Santa Ana, to handle it, obviously as a result of knowledge that Oosten's milk would not be handled by union members. [Tr. p. 1025.] On August 10, 1951, Oosten filed his Complaint for an injunction with the Superior Court of the State of California for the County of Los Angeles, and obtained the first temporary restraining order. On August 27, 1951, Knudsen filed its Answer. On August 28, 1951, the defendant unions served,

and caused to be filed, a Memorandum for Setting for Trial, stating that the case was entitled to preference in setting, and citing Section 527 of the Code of Civil Procedure. On September 6, 1951, the Superior Court for Los Angeles County advised of the setting of the cause for trial on November 19, 1951. The case came on for trial on November 19, 1951, and was tried from day to day thereafter until December 3, 1951, whereupon the trial court, on its own motion, continued the cause until April 1, 1952, and expressed as its reason for continuance that the trial "instead of taking nine days as originally estimated to try, will probably consume closer to a month to complete the trial and the court is of the opinion that it would be helped considerably and it would be in the furtherance of justice to wait until the Supreme Court of the State has made its decision in connection with three cases which have been decided by two divisions of the District Court of Appeal which three cases are set for hearing before the Supreme Court on or before January 16, 1952." [Tr. p. 946.] On November 20, 1951, in denying an objection to introduction of evidence, Judge Houser had given his analysis of the Jurisdictional Strike Act, held it Constitutional, and ordered the trial to proceed. [Tr. p. 38.]

Opposition to the continuance was expressed by Knudsen on the grounds:

> "And the Knudsen Creamery Company opposes the continuance on the ground it is only collaterally affected by the Jurisdictional Strike Act, that it seeks a determination of its position in this controversy and expresses its ability to complete the presentation of the balance of the case of the defendant Knudsen Creamery Company within a period of from five to seven days at the most." [Tr. p. 947.]

Both plaintiff Oosten and defendant unions stipulated to the continuance.

On dates after March 15, 1951, when no further damages were accruing because Oosten had abandoned his contract, Knudsen stipulated to further continuances.

It should be observed that the action was commenced on November 19, 1951, and was in course of trial from day to day thereafter, with both Oosten's and the union's testimony completed on mid-afternoon of November 27, 1951. The trial court found no occasion on conclusion of the presentations of Oosten and the union on November 27, 1951 to continue the matter by reason of the Jurisdictional Strike Act. In mid-afternoon of November 27, 1951, and thereafter until December 3, 1951, Knudsen put on its case, which could have no possible effect on the issue between Oosten and the unions as to the applicability of the Jurisdictional Strike Act.

After fifty of Knudsen's plant employees had testified, to the accompaniment of the expressions of Judge Houser's disgruntlement appearing in quotations in Respondent's Brief at pages 21 to 25, the trial judge requested a Chambers conference on the afternoon of November 30, 1951, which was unreported [Tr. p. 944] and in which continuance stipulation was requested by the judge. This conference of judge and counsel was resumed on the morning of December 3, and failing to exact stipulation from all of the parties for the continuance, the court on its own motion made the Order for continuance of trial of the case until April 1, 1952. The unions stipulated to the continuance. Apparently Oosten felt that he had nothing to lose, as his counsel expressed that he had obtained a satisfactory market for his milk. [Clk. Tr. p. 59.]

Both in the unreported part of the Chambers conference and in the transcript, Knudsen's request that the trial proceed in order that it might have an adjudication of its responsibilities in the matter was wholly ignored by the trial judge. [Tr. p. 946.]

Note that after hearing the testimony of the union members in the trial courtroom on November 27th to 30th, Oosten did not again attempt to deliver his milk to Knudsen. If a "test" of the employees was to be made this was the time for it, while the Court had jurisdiction, the controversy was pending, and the basis of the decision could be made known. On March 15, 1952, Oosten sold his dairy and proceeded to relocate in Orange County, executing a contract with Excelsior Creamery Company and abandoning his contract with Knudsen.

It could be contended that the issue of damages was a thing of the past at time of grant of continuance since Oosten's counsel expressed satisfaction with his market on December 3, 1951, and no prejudice would result from delay of the matter. However, when the cause was resumed on April 21, 1953, he was permitted to introduce evidence of damage arising out of his marketing of his milk between December 3, 1951, and March 15, 1952, over the objection of Knudsen. [Tr. pp. 962-976.] The award of damages embraces that period.

The result from the sequence of events is that an award of damages has been made for a period during which Knudsen was deprived of a hearing by the overt and affirmative act of the trial judge, on his own motion, without lawful reason, and to this extent at the very least the Judgment is a taking of property of Knudsen following a denial of hearing and without due process.

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STATUTE

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IN THE

Supreme Court of the United States

October Term, 1955

No. 819

JOHN OOSTEN,

Plaintiff and Respondent,

vs.

HAY HAULERS, DAIRY EMPLOYEES AND HELPERS UNION, LOCAL UNION NO. 737, A. F. of L.; PLANT AND CLERICAL DAIRY EMPLOYEES UNION, LOCAL UNION NO. 93, A. F. of L.; KNUDSEN CREAMERY COMPANY OF CALIFORNIA, a corporation, THOMAS C. CASE, JACK MENAGE, AL MOEN and MARK WHITING, JOHN DOE 1 to 10, INCLUSIVE OF ALL INTERVENING MEMBERS AS THOUGH EACH JOHN DOE WERE SEVERALLY AND SEPARATELY DESIGNATED,

Defendants.

KNUDSEN CREAMERY CO. OF CALIFORNIA,

Petitioner.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Supreme Court of California is reported in 45 Cal. 2d 784, 291 P. 2d 17. The petition for rehearing by the Supreme Court of California was denied January 18, 1956 (46 A. C. No. 2 Minutes, p. 1). Petitioner has referred to the opinion of the District Court of Appeal, Second Appellate District, Division One, of California.[1]

[1]Petitioner has referred to the opinion of the District Court of Appeal—an intermediate appellate court in California. Under California practice once a case has been transferred to the Supreme Court, the decision of the District Court of Appeal is vacated and no longer has any effect in that case or as a precedent. (*Estate of Kent*, 6 Cal. 2d 154, 156, 57 P. 2d 901, 902.)

Jurisdiction.

Jurisdiction is invoked here under Section 1257(3) of Title 28, U. S. Code.

Question Presented.

This case does not involve a question of constitutional law. It does not raise questions of deprivation of due process of law, nor the denial of equal protection of the laws, as contended by petitioner. The case does involve the proper interpretation by the California courts of a written contract made in California under California law. The petitioner themselves contended, and have from the beginning, that by reason of circumstances which occurred during the life of the contract that it became "impossible" of performance. The trial court ruled against petitioner on the facts before it. The Supreme Court of the State of California sustained the trial court. No question has been presented, or is presented, which warrants the intervention of this Court.

Preliminary Statement.

The decision of the highest court of the State of California, the Supreme Court, affirming the judgment of the trier of the facts, is a correct decision. It involved the construction of a California contract for the delivery of milk to the petitioner, which contract was made in California, to be performed in California. The facts were fully heard by the trial court.[2]

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[2]The decision of the Supreme Court of California, 45 Cal. 2d 784, 291 P. 2d 17, among other things said: "On the record before us the trial court was justified in concluding, as it did, that defendant was not prevented by impossibility from performing the contract."

We may urge that even if the judgment of the highest court of California were erroneous, and even if the California courts had mistakenly applied local law to a local contract, that error would not raise a constitutional question in the context of this case.[3]

The plaintiff and respondent, John Oosten, had a written contract with defendant and petitioner, Knudsen Creamery Co. of California, under which Knudsen agreed to purchase milk from Oosten, respondent, a dairy man. Knudsen failed to perform the contract, and raised the defense of "impossibility." The trial court found on the evidence that Knudsen had not proved the defense, and gave judgment to Oosten.[4]

On appeal the California Supreme Court properly held that the evidence supported the finding that Knudsen had not shown "impossibility," as that doctrine exists under the law of the State of California.

The facts of the case as stated in the opinion of the California Supreme Court demonstrate that its decision correctly applied California contract law. We will summarize those facts, as contrasted with facts cited in the petition, and then demonstrate that the petition should be denied.

Statement of Facts.

Plaintiff Oosten was a dairy farmer and Knudsen (petitioner) a distributor. A written contract which had been in existence and renewed from time to time over a period

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[3]The constitutional questions here attempted to be urged by petitioner were not raised by them in the trial court.

[4]The Supreme Court of California in its decision, *supra*, said: "Defendant (petitioner) at no time told its employees that if they refused to handle plaintiff's milk they would be discharged."

of years between them, obligated Knudsen to purchase Oosten's milk at Class 1 prices for the term of the contract.

Oosten became involved in a dispute with Local 737, but, nevertheless, was able to perform the contract by delivering his milk at Knudsen's plant.

Knudsen had no connection, contractual or otherwise, with Local 737. Knudsen did have a collective bargaining agreement with Local 93 covering the Knudsen employees.

Some of the Knudsen employees refused to receive or unload Oosten's milk at the Knudsen plant on the grounds that it was "hot." Thereupon Knudsen refused to receive and purchase the Oosten milk. Knudsen at no time reprimanded any of its employees for failure to perform. None of them were discharged or disciplined in any manner.

The written contract between Knudsen and Oosten did excuse a failure to perform by Knudsen if its performance was made "impossible" by labor trouble. That clause was the principal defense of Knudsen.

The evidence showed that upon a vague threat from its employees, Knudsen simply did nothing.[5]

Upon only one occasion did Knudsen really order an employee to receive the milk. Knudsen did not at any time

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[5]The Supreme Court of California, 45 Cal. 2d 784, 291 P. 2d 17, *supra*, said: "The trial court was justified in its finding that defendant had not proven 'impossibility'; indeed, it may have concluded that defendant showed nothing more than a vague threat of adverse action by Local 93 and the employees (see, *Moore v. Whitty* (Pa.), 149 A. 93, 94), and that defendant was under no pressure other than its desire not to antagonize Local 93."

order its employees to perform the duties of their jobs. Nor did Knudsen make any effort to persuade them, or to persuade Local 93 that the milk should be handled.

Knudsen had done business with Local 93 for a number of years by contract. This contract was a Master Agreement covering employees of Knudsen and other processors and distributors of milk.

This agreement between Knudsen and its own employees contained a "no strike" clause, and provided for negotiation or arbitration of controversies.[6]

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[6]The Master Agreement just hereinabove referred to covering Knudsen (petitioner) and its employees, and which had been in existence for years [R. T. pp. 656, 657], contained a paragraph, Article X, as follows:

> "Settlement of controversy. Section 1. It is agreed by the union and the employer that there shall be no strike or lockouts during the life of this agreement and that any and all controversies which may arise shall be settled as hereinafter provided in Section 2. An attempt shall first be made to settle the matter by conference between representatives of the employer and the union. Section 3. If a settlement satisfactory to both is not brought about in this manner then a conciliator satisfactory to both parties may be appointed for the purpose of reconciling the differences between the parties. Section 4. If this procedure does not settle the matter then either party may require it to be submitted to arbitration by an arbitration committee. Said arbitration committee shall consist of two representatives of the employer and two representatives of the union with a fifth neutral member. The fifth member shall be chosen by the four representatives named above and shall preside as chairman. Within five days of the appointment of said fifth member the committee of arbitration shall hold hearings and determine the facts involved in any controversy and make its decision in writing within a period not to exceed five days and shall furnish the parties involved with copies of said decision. The decision arrived at pursuant to this procedure shall be binding upon the parties thereto. Failure by either party to abide by and conform to such decision shall entitle the other party to such controversy and proceedings to terminate this agreement at such party's option."

Knudsen, however, made no effort whatever to invoke the procedure outlined under their very contract, and took no other remedial action of any kind.

On this evidence the trial court concluded that Knudsen had not sustained its burden of proving its defense of "impossibility" under the contract.

The California Supreme Court affirmed, holding that the trial court had correctly applied California law to the case.

Respondent had contended from the beginning that Knudsen made no sincere effort to comply with its contract with Oosten to take his milk, or to compel compliance with its own contract with its own employees covering the services to be rendered for Knudsen by such employees.

ARGUMENT.

The Petition Fails to Raise a Constitutional Question.

Petitioner's real arguments are of two kinds:

(1) The contention that the *facts* of the case are in its favor, and the California courts erred in finding facts unfavorable to its position;

(2) The argument that, because no judgment was made against the defendant unions (with whom Oosten had no contractual relationship), therefore a judgment against Knudsen because of a breach of its written contract with Oosten was unfair and discriminatory.

The first argument, running throughout the petition, does not present a question to be decided by this Honorable Court. It is familiar law that a finding of fact based upon substantial evidence is binding upon the appellate

courts. The California Supreme Court held that the finding of the trial court on the defense of impossibility was supported by the evidence.[7]

It accordingly affirmed the judgment.

The second argument completely misconceives the nature of the controversy. It is true that the defendant unions were not held liable to plaintiff Oosten. But whether or not the defendant unions could be held or were liable to Oosten was in no way determinative of Knudsen's obliga-

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[7]The Supreme Court of California in its decision, 45 Cal. 2d 784, 789 (291 P. 2d 17, 21), *supra*, with reference to this subject held:

> *"On the record before us the trial court was justified in concluding, as it did, that defendant was not prevented by impossibility from performing the contract.* There was no evidence that the union would call a strike if the milk was received by defendant, except the inference that might be drawn from its claim in a similar situation a year before that it would shut down defendant's plant if defendant handled hot milk. The trial court was not compelled to draw that inference. The court could have given little weight to the effect of defendant's employees of the statement by the officials and attorney of Local 93 that they, as individuals, were not required to handle hot milk or that the telling of defendant that they would not consider it a breach of the collective bargaining agreement between defendant and Local 93 for the employees to refuse to handle the milk. Defendant at no time told its employees that if they refused to handle plaintiff's milk they would be discharged. In the bargaining agreement between defendant and Local 93 the latter agreed that there shall be no strike during the life of the agreement and if any controversy arose it would be settled by the negotiation procedure in the agreement, and ultimately by arbitration, if the other means failed. The court could infer that Local 93 would abide by the agreement. No steps were taken to settle any controversy under the agreement." * * * (at 45 Cal. 2d 790, 291 P. 2d 21, *supra*)
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> "The trial court was justified in its finding that defendant had not proven impossibility; indeed, it may have concluded that defendant showed nothing more than a vague threat of adverse action by Local 93 and the employees (see, Moore v. Whitty (Pa.), 149 A. 93, 94), and that defendant was under no pressure other than its desire not to antagonize Local 93."

tions to Oosten under a written contract. It is not true, as stated by the petition, that Knudsen has been held liable because of the acts of its employees. Knudsen was held liable because of *its* failure to even attempt to perform a contract which it made.

The fact that different parties, operating under different circumstances and different legal obligations, encounter different legal results is not a showing of unequal protection of law.

The petition also urges the labor aspects of the case in an effort to bolster the petition. However, the California Supreme Court decision is not based upon any federal labor statute, nor in fact upon "labor law" at all. It is based entirely upon the California law of contracts, and that is what the case is about.

This Court and other Federal courts have repeatedly followed the law of the state of origin as announced by the highest court in the state. (*Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188; *Lyon v. Mutual Benefit Health and Accident Assn.,* 305 U. S. 484; *Pennsylvania R. R. v. Hughes,* 191 U. S. 477, 24 S. Ct. 132; *Henry H. Kryger v. Wilson,* 242 U. S. 171, 61 L. Ed. 229; *So. Pacific Company v. State of Arizona,* 249 U. S. 472, 63 L. Ed. 713; *Six Companies of California v. Joint Highway District No. 13,* 311 U. S. 180, 85 L. Ed. 114.

In *Kryger v. Wilson,* 242 U. S. 171, 61 L. Ed. 229, 232, the Court held:

> "The court below, having jurisdiction of the suit to quiet title, was called upon to quiet title, was called upon to determine the conflicting claims to the land. The plaintiff in error voluntarily appeared, and he availed himself of the opportunity to urge his claims to equitable ownership under the contract of sale. The

court decided against him, holding the contract no longer outstanding. The most that the plaintiff in error can say is that the state court made a mistaken application of doctrine of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the situs instead of the place of making and performance. *But that, being purely a question of local common law, is a matter with which this court is not concerned.* (Citing cases.)" (Emphasis ours.)

It has been said that "Impairment by judicial decision does not raise a federal question." (*Cross Lake Shooting and Fishing Club v. Louisiana,* 224 U. S. 632, 56 L. Ed. 924.)

In *Regents of Georgia v. Carroll,* 338 U. S. 586, 94 L. Ed. 363, 371, it was said:

"We may summarily dispose of the defense of impossibility of performance. It is a matter of state law. It was a defense made in a state court to a contract entered into under the law of Georgia."

The decision of the California Supreme Court is a correct application of the law of California. The facts and the law were fully considered by the trial court and by the Supreme Court of the State of California, and in disposing of the matter the Supreme Court of California said (45 Cal. 2d 784, 788, 291 P. 2d 17, 20):

"Impossibility of performance is a defense and the burden of proof in establishing it rests on defendant (petitioner). (Hensler v. City of Los Angeles, 124 Cal. App. 2d 71, 83; Paramount Pictures, Inc. v. Sparling, 93 Cal. App. 2d 768; McCulloch v. Liguori, 88 Cal. App. 2d 366; Lloyd v. Murphy, 25 Cal. 2d 48.) 'Impossibility' is defined in section 454 of the Re-

> statement of Contracts, as not only strict impossibility but as impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. Temporary impossibility of the character which, if it should become permanent, would discharge a promisor's entire contractual duty, operates as a permanent discharge if performance after the impossibility ceases would impose a substantially greater burden upon the promisor; otherwise the duty is suspended while the impossibility exists. (Restatement of Contracts, Sec. 642.)" *Autry v. Republic Products, Inc.*, 30 Cal. 2d 144, 148; *Lloyd v. Murphy, supra,* 25 Cal. 2d 48.)

In the instant case we construe clause 12, with respect to impossibility of performance, the same as it is construed generally in contract law with regard to whether the performance has been made impossible. The only things the clause adds are that certain things—labor dispute, strikes—may excuse performance, when without it they might not, but the question remains whether those things have made performance impossible. As has been said:

> "We can not always be sure what 'causes are beyond the control' of the contractor. Many fires can be prevented by the use of foresight and sufficient expenditure. Most strikes can be avoided by a judicious yielding or by an abject surrender to demands. No contractor is excused under such an express provision unless he shows affirmatively that his failure to perform was proximately caused by a contingency within its terms; that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive." (Corbin on Contracts, Sec. 1342.)

The constitutional guarantees invoked by petitioner at this late date are in no way involved or infringed by the decision. Accordingly, the petition is without merit and should be denied.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Respondent, John Oosten.

JOHN VAN AALST,
Of Counsel.